IN THE MATTER OF WASTE TECHNOLOGIES INDUSTRIES, EAST LIVERPOOL, OHIO

Consolidated RCRA Appeal Nos. 92–7, *et alia*

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided July 24, 1992

Syllabus

This Order consolidates seven petitions for review of a February 3, 1992 decision by U.S. EPA Region 5. In that decision, the Region granted Waste Technologies Industries' (WTI's) request for a modification to its 1983 Resource, Conservation and Recovery Act permit. The 1983 permit allowed WTI to construct a commercial hazardous waste management facility in East Liverpool, Ohio. The February 3, 1992 modification allows WTI to add a spray dryer to its pollution control equipment. In addition to approving the modification request, the Region, sua sponte, decided to modify the permit to include the Port Authority for Columbiana County, Ohio, the property owner, as a co-permittee.

The following parties have filed petitions for review with the Board: the Port Authority for Columbiana County, Ohio, the Attorney General of the State of West Virginia, the City of Pittsburgh, PA, Constance W. Stein/SOS, Samuel N. Kusic, the Sierra Club-Allegheny Group, and Carol S. Hicks.

Held: Absent the consent of the permittee, the Region lacks the authority under 40 C.F.R. §270.42 to modify the permit sua sponte to include the Port Authority of Columbiana County, Ohio as a co-permittee. The matter is therefore remanded and the Region is ordered to withdraw its proposal to modify the permit in this way. With regard to the remaining issues raised by the above-named petitioners, none satisfies the requirements for review under 40 C.F.R. § 124.19. Accordingly, review is denied.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

On June 24, 1983, Region 5 issued a permit under the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C.A. §§ 6901–6992k, authorizing Waste Technologies Industries (WTI) to construct a commercial hazardous waste management facility in East

Liverpool, Ohio. The permit authorizes the storage of hazardous wastes in tanks and containers, the treatment of hazardous wastes, and the incineration of hazardous wastes. After an appeal to the Administrator, the permit became final and effective on January 25, 1985. *See In the Matter of Waste Technologies Industries,* RCRA Appeal No. 83–5 (Dec. 17, 1984) (Order Denying Petitions for Review).

The facility is designed to incinerate organic wastes in a kiln and secondary combustion chamber. The flue gas from the secondary combustion chamber is cleaned through air pollution control equipment before being released to the atmosphere. This equipment includes a waste heat recovery boiler, an electrostatic precipitator and a wet scrubbing system.

On October 29, 1990, WTI requested a modification of the 1983 permit that would allow it to add a spray dryer to its pollution control equipment, between the waste heat recovery boiler and the electrostatic precipitator. The spray dryer would utilize the liquid from the wet scrubber to quench the flue gas and reduce its temperature. The modification would also reduce the amount of liquid waste generated from the wet scrubbing system and subsequently discharged to the municipal sewer system. The Region classified the requested change as a Class 3 modification. *See* 40 C.F.R. § 270.42(c). On February 3, 1992, after reviewing and responding to public comments, the Region granted the spray dryer modification. In addition, the Region, *sua sponte,* decided to modify the permit to include the Port Authority for Columbiana County, Ohio, the property owner, as a co-permittee. This change was classified as a Class 1 permit modification. *See* 40 C.F.R. § 270.42(a). A total of seven appeals have been filed under 40 C.F.R. § 124.19 from the permit modification. The following parties have filed appeals: the Port Authority for Columbiana County, Ohio, (RCRA Appeal No. 92–7); the Attorney General of the State of West Virginia, (RCRA Appeal No. 92–10); the City of Pittsburgh, PA (RCRA Appeal No. 92–11); Constance W. Stein/SOS (RCRA Appeal No. 92–12); Samuel N. Kusic (RCRA Appeal No. 92–13); the Sierra Club-Allegheny Group (RCRA Appeal No. 92–15); and Carol S. Hicks (RCRA Appeal No. 92–16). On April 20, 1992, the Region responded to the petition filed by the Port Authority of Columbiana County, Ohio (hereafter "Region Response to Port Authority Petition").[1] The Region responded to the remaining

[1] *See* Response of United States Environmental Protection Agency to Petitioner Columbiana County Port Authority's Request for Review of Class 1 Modification to Waste Technologies Industries' Hazardous Waste Permit (dated April 20, 1992).

petitions on May 5, 1992 (hereafter "Region Response to Petitions").[2] WTI submitted a response to the petitions on April 18, 1992. This order consolidates these appeals.

Under the rules governing this proceeding, there is no appeal as of right from the Region's permit decision. Ordinarily, a RCRA permit determination will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19(a); *In the Matter of Chemical Waste Management Inc.*, RCRA Appeal No. 87–12, at 2 (May 27, 1988); *In the Matter of Highway 36 Land Development Co.*, RCRA Appeal No. 87–5, at 2 (September 2, 1987). The preamble to the regulations states that "this power of review should only be sparingly exercised" and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the Petitioners. None of the Petitioners has shown that review of the spray dryer modification is warranted under 40 C.F.R. § 124.19, and therefore review of that proposal is denied.[3] As to the addition of the Port Authority's name to the permit, we remand the permit to the Region for withdrawal of that proposal. Our reasons follow.

PORT AUTHORITY OF COLUMBIANA COUNTY APPEAL

The Region added the Port Authority's name to the permit on its own initiative because EPA regulations require landowners such as the Port Authority to sign the permit application and to be listed as co-permittee along with the facility's operator.[4] In this instance, the Port Authority is the owner of the land on which WTI's hazardous waste incinerator is situated, and WTI is a tenant in possession under a long term lease from the Port Authority. Although the Port Authority does not dispute the Region's reading of the law regarding

[2] *See* United States Environmental Protection Agency, Region V, Response to Consolidated [sic] Petitions for Review (dated May 5, 1992).

[3] As a preliminary matter, we reject WTI's assertion that all of the petitions (except the one filed by the Port Authority of Columbiana County, Ohio) should be dismissed because they were untimely and because they were not directed to the Environmental Appeals Board. First, the record on appeal indicates (and the Region attests) that all of the petitions were filed within the prescribed time period. Second, the Region's notice of the final permit decision stated that any petitions for review should be filed with the Headquarters Hearing Clerk. Under the circumstances, failure to file with the Board amounted to harmless error, at most. The Board will treat each petition as properly filed. *See American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules when justice so requires).

[4] *See* 40 C.F.R. §§ 270.1(c) and 270.10(b).

property owners' permit responsibilities, it nevertheless objects to being added to the permit at this late date, since its ownership of the land and its relationship to WTI were all known to EPA Region 5 when the permit was issued in 1983, and even as early as 1981 when WTI first applied for the permit. The Port Authority adds that it has never applied for a permit and has never joined in the permit application by signing it; in fact, both the Port Authority and the Region agree that EPA has never requested it to execute a permit application or participate in any application proceeding. For these reasons, the Port Authority contends that the Region is now barred as a matter of law from adding its name to the permit.[5]

The controversy over the addition of the Port Authority to the permit is more procedural than substantive. The critical facts are few in number and not in dispute: stated concisely, the Port Authority was never added to the permit despite the fact that its ownership of the land was known to the Region at all relevant times. In addition, the critical legal requirements are settled as far as the Agency is concerned: landowners as well as tenant-operators are each required to have a permit.[6] It is only the procedures the Region has

[5] WTI has expressed no opinion on the issue of adding the Port Authority to the permit. It expressly states that it takes no position on this issue and will not oppose review of it. *See* WTI's Response at 2 & 18, notes 1 & 6, respectively (dated April 18, 1992).

[6] As explained in *Ford Motor Company, et al.*, RCRA Appeal Nos. 90–9 & 90–9A, at 7–8 (Administrator, October 2, 1991),

> The regulations requiring absentee owners to become permittees faithfully implement Congressional intent. As EPA's Chief Judicial Officer pointed out in *Arrcom, Inc.*, RCRA (3008) Appeal No. 86–6 (May 19, 1986), the express language of RCRA reflects Congressional intent to impose RCRA requirements on both owners and operators of facilities. Section 3004 of RCRA directs the Administrator to promulgate regulations "applicable to *owners and operators* of facilities for the treatment, storage or disposal of hazardous waste * * *." 42 U.S.C. §6924 (emphasis added). Section 3005(a) of RCRA provides, without qualification, that
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> > the Administrator shall promulgate regulations requiring each person *owning or operating* an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste * * * to have a permit issued pursuant to this section.
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> 42 U.S.C. §6925(a). Thus, Congress clearly intended to subject absentee owners to liability under RCRA.

The Agency has visited the issue of the landowner's permit relationship to the facility operator on other occasions and has concluded that the landowner is legally required under RCRA to have a permit. *See, e.g., Hawaiian Western Steel, et al.*, RCRA (3008) Appeal No. 88–2 (Administrator, November 17, 1988) (concluding that

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invoked that are cause for concern and require resolution. As explained below, it is our conclusion that the Region is correct in wanting to add the Port Authority to the permit, but the method it has chosen for accomplishing that goal is procedurally flawed. Our reasons and additional background discussion follow.

By way of explaining the omission of the Port Authority from the permit, and the timing of the instant proposal to add the Port Authority, the Region asserts that in cases where the owner and operator are not the same individuals it was not "Agency practice in the early 1980's * * * to distinguish between facility owners and property owners." Region Response to Port Authority Petition at 5. It was only later, after a "reminder" memorandum[7] was sent from EPA headquarters, under date of July 30, 1984, that the Region began adding landowners to permits, and then, only prospectively.[8] The operator's subsequent request to modify the permit to authorize installation and operation of a spray dryer was seen by the Region as a convenient opportunity to correct the earlier omission. The next

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nonparticipating owner is liable for failure of the facility to have a permit); *Arrcom, Inc.* RCRA (3008) Appeal No. 86–6 (CJO, May 19, 1986) (same).

[7] *See* Memorandum from Director, Office of Solid Waste, to Regional Division Directors, Regions I–X (dated July 30, 1984) (entitled "Issuance of RCRA Permits to Facility Owners and Operators"). In reality, the change in Agency practice brought about by the headquarters' memorandum, which was written approximately one year after the permit in this case was issued, seems less like a change and more like a reproof, reminding inattentive permit writers not to overlook the requirement to add landowners to the permits. The text of the July 30, 1984 memorandum reads as follows:

> This Office [i.e., the Office of Solid Waste] continues to learn of RCRA permits being issued only to facility operators in those instances where the facility operator and the facility owner are different people. Section 270.1(c) requires that "owners and operators of hazardous waste management units must have permits during the active life (including closure) of the facility * * *." In addition, § 270.10(b) requires the operator to apply for the permit and the owner to sign the application along with the operator when the facility operator and owner are different persons (see § 270.10(b)).
>
> Please ensure in the future that all RCRA permits are issued to both the owner and operator of the facility in those cases where the facility is owned by one person and operated by another.

Ultimately, whether at the time in question there was or was not an Agency practice in place of the type described by the Region is not determinative of the issue at hand, for it is clear that the practice, to the extent it existed, did not represent a correct interpretation of the fundamental legal provisions governing permit issuance.

[8] Region Response to Port Authority Petition, at 5.

formal opportunity to add the Port Authority, according to the Region, would not arise until the present permit expires in January 1995.

Notwithstanding this background, there has not been any substantive change in the law throughout the relevant time periods. In particular, sections 270.1(c) and 270.10(b) of the regulations, 40 C.F.R. §§ 270.1(c) & 270.10(b), which provide the necessary authority for the Region to add landowners as co-permittees, have been on the books in their present form since April 1, 1983, *see generally* 48 Fed. Reg. 14228, *et seq.* (April 1, 1983):

> § 270.1(c) Owners and operators of hazardous waste management units must have permits during the active life * * * of the unit * * *.
>
> § 270.10(b) Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application.

As explained in *Hawaiian Western Steel, et al.*, RCRA (3008) Appeal No. 88–2 (Administrator, November 17, 1988), these regulations were also in existence prior to April 1, 1983, in a slightly modified but substantively unchanged form. Therefore, both before and after the Region issued the permit on June 24, 1983, the applicable regulations consistently treated landowners as persons who, along with the operator of a hazardous waste facility, were required to have a permit. It therefore appears that in 1983 Region 5 and, perhaps, other Regions were mistaken or confused as to the exact nature of their permit-issuing responsibilities.

Regardless of the situation on June 24, 1983, the critical legal requirements are no longer the subject of inconsistent application or interpretation within the Agency: landowners as well as tenant-operators are each required to have a permit.[9] Provision for the owner's signature on the operator's permit application serves as a convenience, allowing one application—tantamount to a joint application—to be filed by the operator, rather than one each by the owner and the operator. *Hawaiian Western Steel,* supra at 8 ("Section 270.10(b) serves to streamline the permit process by relieving the

[9] *See* notes 4 & 6, *supra.*

owner of the responsibility for obtaining a separate permit when, and only when, the owner signs the operator's permit application.").

It comes as no surprise that the Region saw WTI's permit modification request as an inviting and convenient opportunity to correct the record. Regrettably, the Agency's permit modification regulations, 40 C.F.R. §§ 270.41 & 42, do not make any provision for this type of permit revision—at least not without the express consent of WTI, as the named permittee.[10] The modification regulations are structured to allow the Agency to initiate permit modifications for cause, 40 C.F.R. § 270.41(a) & (b), and if the Agency's reasons for wanting to initiate a permit modification do not fit within one of the enumerated categories, as is the case here, the only available mechanism under the regulations for modifying the permit is a permittee-initiated permit modification, 40 C.F.R. § 270.42. In its response to the petitions for review, the Region recognizes that its reasons for wanting to modify the permit do not fit within any of the Agency-initiated categories. It nevertheless argues that it may avail itself of one of the permittee-initiated categories, specifically the so-called Class 1 modification category, which encompasses very minor modifications, ones that permittees may generally implement without prior advance notice to either the Agency or the public.[11] *See* 40 C.F.R. § 270.42(a) and § 270.42 (Appendix I). We disagree.

First, it is evident from the structure of the regulations, which places Agency-initiated permit modifications under a separate heading from permittee-initiated modifications, and simultaneously lists different criteria under each heading, that the Agency intended distinctions to be drawn between the two categories. There is no suggestion in these regulations that the Agency's powers to initiate modifications is inherently equal to or broader in scope than those of permittees. Rather, the powers of each are separately defined. In other words, in writing these regulations the Agency imposed a level of restraint on itself by defining the circumstances under which it, in contrast to permittees, could initiate permit modifications. Second, there is no indication that the revised regulations created the problem, as the Region would have us believe.[12] Insofar as we are able

[10] *See* note 5, *supra.*

[11] It claims that "[i]n revising the regulations the Agency certainly did not intend to give the permittee more procedural flexibility than it gave itself." Region Response to Port Authority Petition, at 6.

[12] In its response to the Port Authority's petition, the Region seeks to give the impression that the failure of the existing regulations to make specific provision for the Agency to initiate minor permit modifications on its own initiative is the result

to determine, the Region would find itself confronting the same dilemma had the pre-revision regulations been in effect.[13] Therefore, we see little light emanating from the Region's reading of the revised permit modification regulations; the regulations are simply not amenable to the task assigned them by the Region.

As its final argument, the Region asserts that its proposal to add the Port Authority to the permit is authorized by § 3005(c)(3) of RCRA, 42 U.S.C.A. § 6925(c)(3). It submits that this section has been "construed broadly" to give the Agency "omnibus authority * * * to change permits to protect human health and the environment," quoting the following language from the section:

> Nothing in this subsection shall preclude the Administrator from reviewing and modifying a permit at any time during its term. * * * Each permit issued under this section shall contain such terms and conditions as the Administrator * * * determines necessary to protect human health and the environment.

Region Response to Port Authority Petition, at 12–13.

There are several problems with the Region's reliance on this language. First, as a matter of clarification and terminology, this section of the Act contains several components, but only the last sentence quoted above is known as the Agency's "omnibus" authority. While the omnibus provision has been construed broadly, no comparable characterization attaches to the first sentence quoted by the Region. Second, the language quoted by the Region comes after the lead sentence of § 3005(c)(3), which states that permits "shall be [issued] for a fixed term, not to exceed 10 years." Therefore, with the lead sentence providing context, it is evident that the purpose of the permit modification sentence is to make it clear that there is no *statutory* bar to modifying a permit, even though § 3005(c)(3) itself says that permits shall be for a fixed term. That does not mean, however, that the Agency, through its power to issue regulations, cannot place limitations upon itself to initiate permit modifications.

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of an oversight in revising the regulations in 1988. Region Response to Port Authority Petition, at 6.

[13] Under those regulations the Region would have faced a nearly identical array of categories in which to find a niche for its proposed permit modification, and as now, it would have confronted an equally uninviting selection. *Compare* 40 C.F.R. § 270.41(a) & (b) (1984) *with* 40 C.F.R. § 270.41(a) & (b) (1991). Also, as now, the Region would first have to obtain the consent of the permittee before proposing this so-called "minor" permit modification. *See* 40 C.F.R. § 270.42 (1984).

As discussed previously, the Agency has done that in this instance by promulgating 40 C.F.R. § 270.41(a) & (b). Therefore, the Agency may not invoke § 3005(c)(3) to bypass these regulations, for it is axiomatic that the Agency must follow its own regulations. *Service* v. *Dulles,* 354 U.S. 363, 372 (1957). Third, even though the omnibus clause may be construed in a way that has broad application, it must be invoked contemporaneously with the action proposed by the permit issuer and it must be supported by appropriate findings. As we recently stated, the permit-issuing Region "may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health or the environment." *Sandoz Pharmaceuticals Corporation,* RCRA Appeal No. 91–14, at 7 (EAB July 9, 1992). There is no indication from the record on appeal that the Region has satisfied these requirements. It appears that invoking § 3005(c)(3) as legal authority for adding the Port Authority to the permit is nothing more than a *post hoc* decision by the Region in response to the Port Authority's appeal.[14] Finally, the Region's rationale for invoking § 3005(c)(3) is specious. Counsel for the Region explains the rationale by asserting, on appeal, that human health and the environment will be better protected by adding the Port Authority to the permit since it "reminds the Port Authority of its responsibility and * * * [thus] place[s] a further check on the facility operator, WTI." Region Response to Port Authority Petition, at 13. The effect on the permit operator from adding the Port Authority to the permit is, in our judgment, speculative at best, thus making the Region's rationale far too tenuous to support a finding of necessity under the omnibus provision. Accordingly, it is our conclusion that the Region's rationale lacks a sufficiently proximate relationship to protection of health and the environment to justify the proposed modification. Therefore, for the foregoing reasons, the Region may not rely on the § 3005(c)(3) in this instance to modify the permit. Accordingly, we remand the matter to the Region to withdraw its proposal to modify the permit by adding the Port Authority's name as co-permittee.

Our conclusion does not mean that the Region is powerless to reach its objective of adding the Port Authority's name to the permit. First, it is conceivable that WTI, if asked, may give its consent to the permit revision, thus enabling the modification to proceed as a permittee-initiated modification. In that event, to address any

[14] A letter from the Region to the Port Authority's counsel, dated January 13, 1992, offers various statutory and regulatory reasons as authority for adding the Port Authority to the permit but makes no mention of § 3005(c)(3) or the omnibus provision. *See* Letter from Nancy-Ellen Zusman, Assistant Regional Counsel, U.S. EPA, Region 5, to J. Michael Kapp, dated January 13, 1992.

lingering concern about the legal effect of adding the name to the permit, it may also be necessary for the Port Authority to ratify the modification—for example, by signing the permit application. Second, if WTI does not consent to the permit revision, or if the Port Authority does not ratify the modification, the Region may also bring an enforcement action against the Port Authority under § 3005 of the Resource Conservation and Recovery Act (RCRA) by issuing a compliance order directing the Port Authority to sign the permit application (or file its own application).[15] Other options may also exist but the choice, of course, lies with the Region, and we make no specific recommendation in that regard.

CITY OF PITTSBURGH APPEAL

A.

The City of Pittsburgh has also filed a petition for review of the co-permittee issue but approaches it from a somewhat different perspective than either the Region or the Port Authority. Although the City agrees with the facts as described above, and with the law insofar as it requires the addition of landowners to permits, it claims that the existing permit is invalid and therefore the addition of the Port Authority to the permit by means of an attempted permit modification at this time would be impermissible. The City claims that by omitting the Port Authority from the permit when it was originally issued the Region has violated the Agency's own regulations. According to the City's reasoning, the permit was invalid when it was issued, and therefore it would be illegal for the Region to try to breathe life into it by means of a permit modification nearly nine years later.

The City nevertheless does not make any specific proposals on how the Agency should respond to this set of circumstances even if we were to agree with the City's negative assessment of the permit's validity, which we do not. Presumably the City wants the Region to withdraw its proposal to add the Port Authority to the permit. Our directions to the Region earlier in this decision are fully responsive to this aspect of the City's petition. Beyond that we enter the realm of speculation. It is possible, for example, that the City also

[15] If the Port Authority does not sign the application, *Hawaiian Western Steel, supra* at 9, makes it clear that the Port Authority must file its own separate application. Also, regardless of whether the Port Authority signs or files an application, "EPA considers the owner (owners) and operators of a facility jointly and severally responsible for carrying out the requirements of the regulations." 45 Fed. Reg. 33,169 (May 19, 1980); *accord Arrcom, Inc., supra* note 6 (citing the quoted language).

wants the Agency to propose the issuance of an entirely new permit for the facility, with both WTI and the Port Authority named as co-permittees. It is also possible that the City wants us to revoke or stay the permit in the meantime, until a new permit can be put into effect. We decline to explore these possibilities. It is only with extreme reluctance—absent a showing of imminent danger to human health or the environment—that we would undo a permit issued nearly nine years ago for a facility which is presently under construction, and nearly completed, merely to adjudicate the addition of a co-permittee's name to the permit. There has been no showing of imminent danger in this instance, and it seems doubtful that there could be. More fundamentally, however, we believe that delving into the permit's validity nine years after it was issued is beyond the scope of the this Board's jurisdiction, which is confined to reviewing the Region's most recent permit determination, not the determination it made in 1983. *See* 40 C.F.R. § 124.19. Accordingly, we make no official ruling on the permit's validity.

That aside, we turn to the matters that are legitimately before us.

B.

The City contends that the additional permit conditions added to the permit for controlling potential adverse effects of the proposed spray dryer will nonetheless be "ineffective in ensuring compliance with the Clean Air Act and applicable regulations." The City cites several reasons in support of this contention, none of which satisfy the requirements for review under 40 C.F.R. § 124.19. The overarching defect is that not only are the reasons individually unpersuasive [16] but they also fail to recognize that compliance with

[16] The City's arguments are, in large measure, criticisms of the permit that the City could have raised when the original permit determination was made in 1983. As noted elsewhere in our decision, objections to that determination are outside the scope of the instant permit modification determination and are not subject to review in this proceeding. In other words, such objections are out of time. Therefore, for these reasons alone, the City's arguments must be dismissed. We nevertheless briefly address them below for the sake of completeness and to provide added context for other subjects addressed in this decision.

First, the City argues that "inaccuracies in the samplings, inspections, and other procedures prescribed in the company's Waste Analysis Plan (WAP) will make it impossible to achieve compliance with the prescribed emission limits * * *." The City provides no support for this assertion, however. Rather, it simply states that inaccuracies *could* result from the WAP's waste sampling measures thereby making it impossible to reduce emissions by adjusting waste feed characteristics. As the Region stated in its Response to Comments (p. 27), however,

emissions standards will be achieved through a number of different mechanisms, not just those identified in the City's petition. Therefore, when the City singles out a few select features of the permit for criticism,[17] it fails to see the larger, more complete picture.[18] The

> Prior to waste approval at the facility, each customer is required to submit to WTI a waste profile for each waste which specifies characteristics and properties of that waste. The waste profile is then screened to ensure that the wastes meet the facility's operating requirements. The 10 percent sampling guideline will be used to ensure that the facility customers are in fact shipping the expected wastes and is consistent with Federal guidelines for the sampling of waste shipment in drums. In addition, each waste shipment will be accompanied by a manifest or shipping form. No waste will be accepted from any customer without first meeting the preacceptance criteria and the appropriate documentation.

The Region determined that these sampling procedures will allow the waste feed to be properly monitored and controlled and will ensure the protection of human health and the environment. There is nothing unreasonable about this determination, and nothing in the City's petition convinces us otherwise.

Second, the City argues that the permit's monitoring requirements are inadequate since they call for continuous monitoring of less than all pollutants and only periodic monitoring of others. Petition at 7–8. This argument does not establish grounds for reviewing the permit. The permit's continuous monitoring requirements for carbon monoxide, oxygen, and hydrocarbons gauge the incinerator's efficiency, which affects all pollutants. Any breakdown in the efficiency will be detected, thus helping to ensure that all pollutant levels will be maintained within acceptable limits.

Finally, the City argues that emissions limits necessary to protect human health and the environment should have been established prior to approval of the modification rather than after the trial burn, and that deferring this determination will foreclose public comment and review. The City implies that establishing emission parameters following the trial burn will not ensure adequate protection of human health and the environment. We disagree. The regulations require that operating conditions be set based on the results of the trial burn and that any permit modification proceed in accordance with 40 C.F.R. Part 270.42. *See* 40 C.F.R. §270.62(b)(10); 40 C.F.R. §264.345(a). Appendix I to 40 C.F.R. §270.42 indicates that minor changes in operating requirements reflecting the results of the trial burn are considered Class 1 modifications. *See* 40 C.F.R. §270.42(a). Thus, by inference, major changes would be considered Class 2 or 3 modifications and require some form of public participation. Nothing in the City's petition or in the record on appeal persuades us that the permit, as currently drafted, will prevent the Region from establishing emissions parameters protective of human health and the environment.

[17] *Id.*

[18] An examination of the permit reveals numerous examples of permit conditions not mentioned in the City's petition which, along with other permit conditions specific to the spray dryer, serve to control potential adverse effects of the incinerator and associated equipment such as the spray dryer. In particular, permit condition C.23 *(General Operating Requirements for Incineration System),* specifies permissible carbon monoxide levels in the flue gas leaving the electrostatic precipitator; requirements for monitoring and recording of carbon monoxide on a continuous basis; waste feed

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totality of the permit is the real gauge for calibrating effective compliance, and the City has not raised any serious doubts about the ability of the permit as a whole to control any adverse effects from adding the spray dryer. Accordingly, we do not believe that the City, with its narrowly drawn criticisms of selected individual features, has met its burden of demonstrating that the permit should be reviewed.

STATE OF WEST VIRGINIA APPEAL

Attorney General of the State of West Virginia raises four issues on appeal. None of these issues warrants the Board's review.

A.

Stated briefly, the State basically argues that the Region should have, but did not, consider whether the site for the facility meets applicable legal and safety standards. The Region had dismissed consideration of this issue because in its opinion the issue was unrelated to the proposed addition of a spray dryer and because the siting issue had been addressed in the original permit determination in 1983. According to the ground rules set by the Region when it solicited public comment on the permit modification, "only those sections of the permit affected by the modification shall be subject to review by the Agency or by the public." Region Response to Petitions at 14. On appeal the State argues that siting issues may be properly raised in this instance since, as provided in 40 C.F.R. § 270.41(c), there is "new information or standards indicat[ing] that a threat to human health or the environment exists which was unknown at the time of permit issuance." According to the State, this criterion is met by an Ohio statute (no citation supplied) that was added to the Ohio Revised Code in 1984. The State says the statute pro-

operating and monitoring requirements, such as, total feed rate, including limitations on the waste feed rate and auxiliary fuel to each incinerator (limited to the range of 49 million Btu/hr to 97.8 million Btu/hr heat input (3 operating hour average)); requirements for monitoring and recording the feed rates for pumpable and gaseous materials; restrictions on waste feed containing any chemical constituents listed in 40 C.F.R. Part 261, Appendix VIII, which have a heat of combustion lower than carbon tetrachloride; mandatory temperature ranges in the secondary combustion chamber while burning hazardous waste (a minimum temperature of 983 degrees Celsius (1800 degrees Fahrenheit) or 1205 degrees Celsius (2200 degrees Fahrenheit), subject to the results of the trial burns; minimum oxygen concentrations in the flue gas leaving the electrostatic precipitator; limitations on total hydrocarbon concentration in the flue gas leaving the wet scrubber; maintenance at all times of the design particulate removal efficiency of the electrostatic precipitator; and cut off of all hazardous waste feed when certain operating limits are exceeded or if there is a loss of draft (negative pressure) for a period of two (2) seconds or longer.

hibits locating the active components of certain hazardous waste facilities within 2,000 feet of "any residence, school, hospital, jail or prison" or within "[a]ny flood hazard area" if the applicant is unable to show that it can withstand certain flood conditions.

We do not believe that West Virginia has made its case by relying on this eight year old Ohio Code provision. First, as a result of administrative appeals, the original permit did not become effective until January 25, 1985, meaning that as a purely technical matter the so-called "new information or standards" was actually not new when the permit became fully effective.[19] Therefore, section 270.41(c) is not available for the use specified by the State. Second, even if the initial permit issuance date (1983) rather than the final permit issuance date (1985) is used as the point of reference, the State's petition does not identify, allege, or single out even one feature of the facility that arguably causes the facility to contravene the Ohio Code provision. By this omission the State's allegation regarding the applicability of section 270.41(c) is obviously incomplete and therefore fails for a general lack of specificity. *See Vermont Yankee Nuclear Power Plant Corp.* v. *NRDC,* 435 U.S. 519, 553–54 (1978); *In the Matter of RMI Company Extrusion Plant,* RCRA Appeal No. 89–20 (May 29, 1991). As to whether the Ohio Code provision represents the kind of new information or standards contemplated by section 270.41(c), the petition also fails on that count. There is no indication that in enacting the provision the Ohio General Assembly made a determination that facilities sited prior to the Code provision's enactment necessarily pose a threat to human health or the environment. Moreover, section 270.41(c) is concerned with new information or standards that might cause the permit issuer to reevaluate whether he correctly assessed the level of risk posed by the facility at the time the permit was issued. In other words, is the risk calculus materially affected by the new information or standard? In answer to this question, we do not believe the Ohio Code provision has any material bearing on EPA's decision. First, the 2,000-foot restriction in the Code represents a generalized, legislative determination by the Ohio legislature rather than a factual determination respecting the actual level of risk presented by this particular facility. EPA's own siting standards are not constrained by this or similar restrictions. According to a report in the administrative record, the Ohio authorities in charge of administering this Code provision determined

[19] Under 40 C.F.R. § 124.15(a), a final decision by the Regional Administrator to issue a permit does not take effect if the permit decision is appealed in accordance with § 124.19. Since there were appeals of the 1983 permit determination, an argument can be made that permit issuance did not occur until the appeals process was completed in 1985. *See also* 40 C.F.R. § 124.19(f)(1).

that the proposed incinerator will not pose an environmental risk to receptors within the 2,000-foot zone.[20] Second, the flood area restriction in the Code is addressed by EPA's own siting standards, and the permit restricts active portions of the facility to a level above the 100-year flood level, which is not materially different from the Ohio Code provision. Accordingly, we conclude that the State of West Virginia has not met its burden on this issue.

B.

The second of the State's four issues centers on the State's assertions that the Region has failed to "indicate that the Emergency Response will be adequate to prevent harm" or that the Agency "will be able to promptly help with local emergency containment of spills before harm occurs to West Virginia's environment and its citizens." West Virginia Petition at 3–4. We see no reason to review the permit based upon these assertions. The permit's contingency plan specifies the procedures that WTI must follow in responding to "fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents" in order to minimize hazards to human health or the environment. *See* 40 C.F.R. § 264.51(a). As the Region stated in responding to comments, WTI's contingency plan

> contains specific procedures to respond to an emergency; [a description of] the arrangements agreed to by the local police and fire departments, hospital, State and local emergency response teams and contractors; a list of all emergency equipment and its location at the facility; [the] name and phone number of [the] emergency coordinator; and an evacuation plan for facility personnel.

Response to Comments at 23. This plan is on file at the facility, the East Liverpool Fire Department, and the East Liverpool Hospital. In addition, the Region has indicated that "[l]ocal emergency response authorities will receive assistance from U.S. EPA's and OEPA's emergency response personnel as necessary to protect public health and the environment." *Id.* at 22. Also, as the Region points out, the facility is designed to prevent spills from reaching the Ohio River. This is accomplished through an extensive containment system that includes paved storage and process areas surrounded with secondary

[20] *See* Center for Hazardous Materials Research, "Final Report: Environmental Review of the Waste Technologies Industries Hazardous Waste Incinerator Located in East Liverpool, Ohio," at 3–4, 3–5 (September 1991).

containment features, and with sumps and pumps to direct spills to storage tanks. Region Response to Petitions at 16. Thus, the record on appeal indicates that all regulatory requirements for contingency planning and hazard prevention pursuant to 40 C.F.R. §§ 264.30–264.56 have been satisfied.

C.

The State's third issue basically represents an expression of concern over whether the Region will vigorously enforce WTI's permit. The State makes reference to certain matters that presumably are intended to illustrate the basis for its concern; however, the State never specifically explains why they represent enforcement deficiencies, much less why they warrant any change in the Region's determination respecting the addition of the spray dryer.[21] This listing of matters over which the State purports to see laxity in the Agency's enforcement initiatives, an allegation the Region contests, does not, without more, establish a link to a "condition" of the permit modification. Absent such a link, there is no jurisdictional basis for the Board to examine these concerns, for only "condition[s] of the permit decision" are reviewable on appeal to the Board. 40 C.F.R. § 124.19. The concerns expressed by the State do not contest any specific condition of the permit modification, nor do they allege that any of the Region's permit determinations were clearly erroneous or otherwise important enough to warrant review. Review is therefore denied.

Our reasons for dismissing this aspect of the State's petition do not in any way diminish the need for the Region to exercise its enforcement responsibilities with appropriate vigor and fairness. The Region has acknowledged its obligation, in conjunction with the State, to monitor WTI's compliance on a routine basis, to enforce the permit if instances of non-compliance occur, and, in the Region's words, "to provide oversight of State permits that are issued under a U.S. EPA authorized State program." *See* Response to Comments at 39.

[21] The cited matters are (i) the omission of the facility owner from the original permit, (ii) a reference to a change of load bearing capacity, (iii) the "prompt notice requirements that WTI report violations," and (iv) the Region "should not ignore the lawful requirements of the governing bodies of this nation," an allusion to a relationship between local zoning requirements and the Federal Emergency Management Act and other unspecified laws of the State of Ohio. West Virginia Petition at 4.

D.

Finally, the State argues that because of the permit's reliance on waste feed indicators rather than discharge indicators, and because of the deletion of an earlier proposal to analyze the spray dryer liquid for metals and hazardous constituents,[22] the Region may not be able "to identify and quantify the discharge of hazardous materials created during the WTI processes * * *." This contention does not raise any issues warranting review. In essence, the State is arguing that the degree to which the Agency has relied on waste feed indicators prevents the Agency from formulating a permit that ensures that the incinerator's emissions are protective of human health and the environment. This argument seeks, in effect, to challenge the foundation of the Agency's regulations prescribing operating standards for hazardous incinerators. Those regulations make it clear, however, that use and analysis of waste feed indicators are integral to the attainment of performance standards. *See generally,* 40 C.F.R. Part 264 Subpart O (Incinerators); 40 C.F.R. § 270.62. As stated in the preamble to the incinerator regulations,

> A comprehensive analysis of the hazardous organic constituents of a waste as it is to be incinerated is necessary to identify the waste components to which the performance standard (especially the destruction and removal requirement) will apply. * * * [T]he analysis required * * * is necessary to allow EPA to define operating conditions necessary to incinerate the waste feed in compliance with appropriate performance standards.

46 Fed. Reg. 7668–69 (January 23, 1981). These regulations were drafted in complete recognition of the fact that it is impossible to monitor and quantify every single pollutant that may be potentially

[22] Such a requirement was in the draft modification proposal but was subsequently deleted in response to WTI's comments. In its comments on the draft permit, WTI objected to performing these analyses on the grounds that they were "completely unreasonable, * * * time consuming, expensive, and would provide absolutely no useful information." *See* Response to Comments at 43 (quoting WTI). In response, the Region acknowledged the technical difficulties but it did not completely accept WTI's argument regarding the utility of the information that could be derived from the analyses. It nevertheless agreed to delete the provision from the permit with the understanding that "the U.S. EPA has decided to characterize the scrubber water during the trial burn to include analyses for total soluble hazardous constituents and condensable metals * * *." *Id.* In this manner, EPA will be able to set operating requirements in the permit so that the scrubber water will not interfere with the attainment of performance standards.

emitted from a hazardous waste incinerator. *See, e.g.*, 46 Fed. Reg. at 7670, 7673. Although this means that the Region may never possess a definitive list of compounds coming out of the stack, a variety of other measures ensures that any such compounds will not present a threat to human health or the environment. These measures include carefully analyzing the waste feed; ensuring that the incinerator only burns the types of wastes that have been the subject of analysis; ensuring a 99.99% destruction and removal efficiency (DRE) for principle organic hazardous constituents (POHCs)[23] during the trial burn;[24] and limiting carbon monoxide (CO) emissions to 100 parts per million to ensure that the incinerator is operating efficiently (*see* note 16, *supra*).[25] According to available scientific data, these measures ensure that hazardous constituents are not emitted in amounts that would present a threat to human health. Accordingly, to the extent the State's arguments seek to fault the Region for not accounting for every single pollutant potentially emitted from the facility, they completely misconstrue the nature of the Agency's regulatory program for controlling emissions from hazardous waste incinerators.[26] Furthermore, since these arguments are in reality directed at the regulatory program itself, rather than the permit modification under consideration, the arguments are outside the scope of the proposal and, hence, outside of the scope of matters that

[23] The Agency designates as POHCs those hazardous constituents that are most difficult to destroy, thereby ensuring that less stable hazardous organic constituents in the waste feed are also destroyed. *See* 46 Fed. Reg. 7669 (January 23, 1981); 40 C.F.R. §§ 270.62(b), 264.342. These POHCs must be destroyed or removed as required by the applicable performance standard.

[24] More precise information about the pollutants will be derived from the trial burn and will be used to set operating parameters for the incinerator and related components.

[25] CO concentration in stack emissions is considered a conventional indicator of combustion efficiency. In addition, maintaining CO levels at less than 100 ppm ensures that emissions from products of incomplete combustion do not pose an unacceptable health risk. *See* Guidance on PIC Controls for Hazardous Waste Incinerators, Volume V of the Hazardous Waste Incineration Guidance Series at 1–1 (April 1990).

[26] As the Region's response to the petition makes clear, the State ignores the numerous mechanisms in place that allow U.S. EPA to determine whether emissions limits are being complied with. To conclude that the installation of the spray dryer would ultimately cause increased emissions without addressing other factors contributing to emissions is not accurate. Several factors under the control of WTI can be adjusted to reduce stack emissions, i.e., a) waste feed characteristics; b) waste feed rates; c) incinerator operating conditions such as pressure, temperature, residence time, and superficial velocity; and d) air pollution control equipment operating conditions such as the number of ESP fields to be operated and liquid to gas ratio in the wet scrubber.

Region Response to Petitions at 18 (citations omitted). Nowhere is there any indication that the Region's reliance on waste feed analysis is in lieu of necessary, complementary provisions for monitoring emissions and operating conditions at the facility.

rected at the regulatory program itself, rather than the permit modification under consideration, the arguments are outside the scope of the proposal and, hence, outside of the scope of matters that may be heard on appeal. Therefore, the issue the State raises is not subject to review on appeal of the permit modification.

STEIN/SOS AND KUSIC APPEALS

Petitioners Constance W. Stein (individually and on behalf of SOS) and Samuel N. Kusic contend that the Region's responses to comments were non-responsive and clearly erroneous and that each response should be reviewed because each such decision constitutes an abuse of discretion and is contrary to the law or public policy. Stein and Kusic Petitions at 1. Mr. Kusic also contends that each such decision is arbitrary and capricious. In addition, Mr. Kusic argues that the Region's notice of the February 3, 1992 modification was defective because it was dated February 3, 1991.

Although both Petitioners have correctly stated the standard for granting review under 40 C.F.R. § 124.19, neither identifies any discrete finding of fact or conclusion of law made by the Region which they contend was clearly erroneous or otherwise warrants review. Rather, both Petitioners seek review of each of the Region's responses. Such a request fails to provide the required statement of reasons supporting review.[27] *See* 40 C.F.R. § 124.19 (petitions for review shall include a statement of reasons supporting review).

Mr. Kusic's argument that notice of the February 3, 1992 modification was defective is without merit. The Region has acknowledged that its original notification letter contained a typographical error, i.e., it was dated February 3, 1991, rather than February 3, 1992. As the Region notes, however, the error was discovered and corrected

[27] On April 30, 1992, the Board received a submission from Ms. Stein and SOS entitled, "Reply to WTI's Motion to Dismiss and Cross Motion for Sanctions" (hereinafter "reply"). In this reply, Ms. Stein refuted WTI's assertion that the petition should be dismissed. *See* note 1, *supra.* In so doing, however, the reply launched a personal attack on Charles H. Waterman III, WTI's attorney, accusing him of, among other things, unscrupulous and unethical behavior. On May 7, 1992, WTI submitted a motion to strike the reply or at least those parts of the reply personally attacking Mr. Waterman. *See* Motion of Waste Technologies Industries to Strike Reply of Constance W. Stein and SOS to WTI's Motion to Dismiss and Motion to Strike the Cross Motion for Sanctions. WTI's motion to strike is granted. The reply is replete with inflammatory language and unsupported attacks on Mr. Waterman's character and competence. Because these attacks appear throughout the reply and are intertwined with the substantive arguments, the entire document is hereby stricken from the record on appeal.

shortly thereafter and neither Mr. Kusic nor anyone else has been prejudiced by the error. (We note that, despite the error, Mr. Kusic's appeal was timely).

SIERRA CLUB APPEAL

In a one page letter objecting to the spray dryer modification, the Sierra Club states:

> [s]cientific procedure mandates that a baseline study be conducted *before* the test burn. This must be done to establish the existing levels of chemical compounds that already exist in the biosphere (humans, air, water, soil, plants and animals) within a proscribed [sic] affected area.
>
> In the absence of the baseline study, the results of a test burn will be questioned by the scientific community.

Sierra Club Petition (emphasis in original). This objection, however, does not raise any substantive issue for review with regard to the spray dryer modification. Rather, it suggests the addition of a new permit requirement unrelated to the modification. Moreover, the petition cites no regulatory or scientific basis for such a study in the present context. The petition therefore fails to satisfy the requirements for review under 40 C.F.R. § 124.19.

HICKS APPEAL

Carol Hicks raises a total of three issues on appeal. These are: (1) the spray dryer should be considered a major design change requiring new modeling and risk analysis because it could have a "major impact on both the air quality and overall plant operation which were not previously, correctly evaluated."; (2) use of the spray dryer will increase stack emissions and result in new combinations of chemicals and metals being released into the environment; and (3) the effective stack height would be lowered because of heat loss caused by the spray dryer design, making the air model previously used incorrect.[28] For the following reasons, review is denied.

[28] Ms. Hicks concludes that the permit process should be reopened by the Ohio EPA. To the extent her request is directed to the Ohio EPA, not the U.S. EPA, it is obviously misdirected and will receive no consideration from us. To the extent the request may have also been intended for the U.S. EPA, it is denied for the reasons stated in the text above.

First, the addition of the spray dryer was in fact classified as a major design change, as Ms. Hicks requests. It was analyzed as a Class 3 modification, that is, one that "substantially alter[s] the facility or its operation." 40 C.F.R. § 270.42(d)(2)(iii). Although, as the Region acknowledges, the change is a significant one, it nevertheless does not require WTI to revisit the 1983 permit by developing new models or implementing a new risk assessment, and Ms. Hicks has not pointed to any information in the record or elsewhere that would warrant reopening the original permit in this way.[29]

Second, the modification does not allow for any increase in emissions from the facility. In fact, the modification requires WTI to comply with more stringent performance standards. The modification adds the following conditions:

> I.C.4.(e)—The incineration system shall meet the emission limits set forth for metals, hydrogen chloride, and chlorine under the final Boilers and Industrial Furnaces rule promulgated by the U.S. EPA on February 21, 1991, as amended.
>
> C.4.(f)—The incineration system shall not emit pollutants in amounts that pose a threat to human health and the environment. Such limits shall be determined from the actual emission factors measured/calculated from the trial burn.

Thus, even if the addition of the spray dryer were to have an effect on emissions, WTI is required to take those measures necessary in order to comply with the more stringent requirements in the modified permit (such as adjusting waste feed characteristics and/or waste feed rates). If the facility's operating conditions are exceeded, the waste feed will be automatically shut off and WTI may be subject to enforcement action.

Finally, Ms. Hicks' asserts that the Region "has failed to prove that the exit temperature from the stack would be adjusted to that used for the air dispersion modeling." Specifically, Ms. Hicks asserts

[29] We note that the Region has undertaken a screening risk assessment to determine whether the facility poses any unacceptable risks to human health and the environment. In addition, a second risk assessment will be conducted utilizing the results of the trial burn and meteorological data and taking into account terrain, demography, receptors, and local climatic conditions. The resulting data will allow for the establishment of operating conditions protective of human health and the environment.

that the spray dryer will cause a reduction in the temperature of gases exiting the stack and that without "additional make up of heat, the effective stack height will be lowered." Appeal at 1. According to Ms. Hicks, the original air modeling was therefore wrong. This argument fails to convince us that review is warranted. As the Region stated in its Response to Comments (p.9), the spray dryer addition will have no impact on the outlet temperature. That is, a loss of heat would result even without the spray dryer addition and, in any case, a reheater will ensure that flue gas temperature is raised to 190 degrees Fahrenheit (the temperature used for the original air dispersion modeling). Moreover, the Region has indicated that it is currently conducting a risk assessment (*see* footnote 29) "based on refined dispersion models and site specific meteorological data" and that the resulting information will be used to establish emissions parameters protective of human health and the environment. Accordingly, review is denied.

CONCLUSION

This matter is remanded and the Region is ordered to withdraw its proposal to modify the permit by adding the Port Authority's name as co-permittee. No appeal of the remand will be necessary to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii).

None of the remaining issues raised by the several petitioners satisfies the requirements for review under 40 C.F.R. § 124.19. As noted above, under longstanding Agency policy, discretion to review a permit decision is to be "sparingly exercised." 45 Fed. Reg. 33,412 (May 19, 1980). In requesting that the Board exercise this discretion, "a petition for review must not only *identify* disputed issues, but *demonstrate* that special and important reasons necessitate review, e.g., a conflict between the permit decision and an applicable statute or regulation, or a conflict between the Regions regarding an important policy matter that requires uniformity." *In the Matter of Waste-Tech Services and BP Chemicals America, Inc.,* RCRA Appeal No. 88–8 at 3 n.2 (Sept. 22, 1988) (emphasis in original). Based on the petitions for review, Regions V's response, WTI's submission, and the record on appeal, we conclude that Petitioners have failed to carry their burden under 40 C.F.R. § 124.19. Accordingly, the petitions for review are denied.[30]

So ordered.

[30] Since the remand gives the Port Authority the relief it has requested, its appeal becomes moot. Therefore, its petition for review is denied for that reason.